IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 291 of 2002

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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SOHANLAL KASIRAM BRAHMIN & 1 - Appellants
Versus
STATE OF GUJARAT & 1 - Opponents

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Appearance :
MR BN KESHWANI for Appellant No. 1.
MR ASHISH M DAGLI for Appellant No. 2.
MR KP RAVAL, APP for Opponents.

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 06/10/2006
ORAL JUDGMENT
(**Per : HONOURABLE MR.JUSTICE K.A.PUJ**)

1. The present appeal is filed by the appellants-original accused Nos. 1 & 2 through Jail against the judgment and order dated 29.01.2002 passed by the learned Additional City Sessions Judge, Court No. 9, Ahmedabad in Sessions Case No. 26 of 2001 whereby the appellants were convicted under Section – 17 read with Section 29 of the Narcotic Drugs & Psychotropic Substance Act, 1985 (hereinafter referred to as "the Act") and were ordered to suffer rigorous imprisonment for a period of 10 years and fine of Rs. 1 Lacs and in default thereof, each of the accused to undergo further R.I of two years.

2. The case of the prosecution is that P.W. 1 – J.N. Parmar, P.I., attached to the State Narcotic Cell was on duty in the morning on 20.11.2000, when while he was in the office with PI Chauhan, he received a secret information to the effect that, two persons of Rajasthani origin one of whom was named Sohanlal and the other being named

Ramchandra and that, the said Sohanlal Kasiram Brahmin would be wearing ear rings in his ears and both of whom would be aged about 30-35 years and information was further given to the effect that, both the above referred persons would be passing form Khokhra Bridge and go to Kankaria Lake from the road behind the Kankaria Zoo and that, both of them would be carrying on their person large quantity of narcotic substance Opium. On receipt of such secret information, the same was reduced in writing in a register maintained in this regard and an entry was made on page No. 104 of the said register with regard to the information received. Immediately after making the entry in the said register, report was made to the superior Officer being the Incharge ACP of the Narcotic Cell and such report was forwarded immediately as per the instructions of P.W. 1 – Mr. Parmar. Subsequent thereto, P.W. 3 – Mr. Chauhan, Police Constables – Hirabhai, Natubhai Makwana, Vinodbhai Dantani were instructed to make preparations to carry out a raid and necessary equipment relating thereto such as wax, seal, string, kit box, weighing scale etc. were gathered and subsequent thereto, P.I. Parmar together with all these persons have

left Gandhinagar office of the State Narcotic Cell in vehicle bearing Registration No. GJ-1-V-3272 and reached the office of the Superintendent of Police, Incharge of the Narcotic Cell who was on duty in the office of the Economic Offences Cell located at the New Mental Hospital premises and on reaching the said office, police constable Natubhai was instructed to secure the presence of Panch witnesses, and PI Parmar went over to the office of the S.P., Incharge of State Narcotic Cell and handed over the necessary report containing the information with regard to the raid in question. Subsequent thereto, on the panchas arriving thereat, a search was carried out with regard to the persons of each of the members of the raiding party including the Panch witnesses and nothing incriminating was found upon such search. A preliminary panchnama was drawn between 12.30 hours and 13.00 hours and after completion of such preliminary panchnama, all the members of the raiding party including the Panchas left the office of the Economic Offences Cell and reached the scene of the raid via Chamunda Bridge, via Anupam Cinema, via Khokhra Bridge and the police vehicle was parked near the compound wall of the Municipal Garden

known as Balvatica. At about 2.00 p.m., two persons corresponding to the description provided in the secret information were seen coming from the Khokhra Bridge towards where the members of the raiding party were found located and scattered in watch. The moment the said two persons came near at the electric pole, one of the two persons, in whose hand there appeared to be a bag containing something heavy in weight therein was apprehended by P.I. Parmar, whereas the second person apprehending his arrest attempted to flee from the scene of the incident and he was immediately caught hold by Police Constable Vinod Dantani.

3. After observing the necessary formalities as laid down in Section 50 of the Act and since the said two persons did not express their desire to have their search in presence of a Magistrate or a Gazetted Officer, firstly, the accused No. 1 - Sohanlal was searched and on opening the bag found in his possession, another rexine bag of light blue colour was found, within which, two plastic bags were found wherein a semi-solid substance which was pinkish brown in colour was found. A preliminary test was carried out by P.I. Parmar with the aid of the kit box and

on such preliminary test, the same was found to be opium. Subsequent thereto, both the bags containing the said substance Opium were weighed together with all the bags in which they were found and the cumulative weight of such substance was established to be 10 Kgs. Soon thereafter, from the substance so found in both the bags, two samples were drawn weighing about 50 Gms. each and a sample to be forwarded to the FSL for analysis and test thereupon was drawn as also a reserve sample was drawn from the bulk of the substance so seized. Such samples were placed into two small plastic bags which were thereafter, heat sealed and both the samples were placed in two separate plastic containers brought along by the members of the raiding party. Slips bearing the signatures of the Panchas as also P.I. Parmar were placed on the top of the containers and both the containers were closed by closing the lid thereon. Subsequently, each of the containers was wrapped in white paper and both of them were tied with string and another slip bearing the signatures of Panchas, P.I. Parmar as well as the accused were placed on the top of each of the containers and thereafter the same was tied up with string and each of the containers

was thereafter sealed by applying a wax seal of PI, NDPS, GS, CID Crime and were sealed in such manner. The sample drawn for the purpose of forwarding the same to the FSL was earmarked as mark “A-1” and the reserve sample was earmarked as mark-A-2, whereas the main bulk of the sample was kept lying in the same state in which it was found during the search and the same was tied up in a transparent plastic bag, which was tied over with string, placed in the rexine bag and the said rexine bag was subsequently placed in the bag of fertilizer. A slip bearing the signatures of P.I. Parmar, the Panchas as also the accused was placed on the top of the rexine bag and the bag of fertilizer was stitched and closed with string and the same was tied in such fashion and another slip bearing the signatures of the Panchas, P.I. Parmar as also the accused was affixed thereon and subsequently the same was also sealed in the same manner.

4. It is also the case of the prosecution that upon the accused No. 2 being searched, it was found that except an amount of Rs. 130 in cash, nothing incriminating was found and hence, except the said cash amount of Rs.

130, nothing was seized from the accused No. 2.

5. It is also the case of the prosecution that a memo with regard to the seizure of the goods was handed over to the accused. A panchnama was drawn at the scene of offence and subsequent thereto, the accused were arrested on account of their having committed an offence punishable under the provisions of the Act and an arrest memo was served on them. P.I. Parmar thereafter got prepared and filed his complaint against the accused. Subsequent thereto, both the accused, the seized muddamal as well as the members of the raiding party came over to the Gandhinagar Zone Police Station and an offence came to be registered in the station diary of the Gandhinagar Zone Police Station at II C.R. 24/2000. Subsequent thereto, a muddamal receipt was got prepared and the Senior Officer was informed with regard to the successful carrying out of the raid in question. Thereafter, further investigation was carried out by P.W. 4 – Mr. J.B. Rana, P.S.I. who after taking charge of the investigation, took possession of the muddamal, the accused as well as the relevant documents pertaining to the raid and during the course

of his investigation, he forwarded the sample to F.S.L. for analysis and test thereupon. On receipt of the relevant documents pertaining to such chemical analysis, the same were made part of investigation records.

6. Pursuant to the registration of the offence, the investigation was put into motion. During the course of investigation, statements of the witnesses were recorded. Based on the F.S.L. Report, since sufficient incriminating evidence was found against the accused, he was charge-sheeted in the Court of learned City Civil & Sessions Judge, Ahmedabad who framed charge against the accused for commission of the offence punishable under Section 17 read with Section 29 of the Act.

7. The charge was read over and explained to the accused. As the accused have not pleaded guilty to the said charge, they were put to trial and tried by the learned Additional City Sessions Judge, Court No. 9, Ahmedabad in Sessions Case No. 26 of 2001.

8. To prove the culpability of the accused, prosecution has

in all examined as many as 5 witnesses. Prosecution has also produced several documents and relied upon the contents of the same. After recording of the evidence of the prosecution witnesses was over, the learned Additional City Sessions Judge, Ahmedabad explained the accused the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statement, as required under Section 313 of the Code. In their further statement, the accused denied the case of the prosecution by reiterating that they have been falsely implicated.

9. On appreciation, evaluation, analysis and close scrutiny of the evidence adduced by the prosecution, the learned Additional City Sessions Judge, Ahmedabad has held that the prosecution has established beyond reasonable doubt that the charge levelled against the accused were proved and, therefore, the accused No. 1 was held guilty of the offence punishable under Section 17 of the Act. The learned Additional City Sessions Judge, Ahmedabad has further held that the accused No. 2 was held guilty under Section 29 of the Act in abetting the offence punishable under Section 17 of the Act. The learned Additional City

Sessions Judge, Ahmedabad has, thereafter, heard the accused and their advocate on sentence and looking to the gravity of the offence committed by the accused and looking to the circumstances, accused Nos. 1 & 2 were sentenced to suffer rigorous imprisonment of 10 years and fine of Rs. 1 Lac each and in default thereof, to undergo R.I. of two years.

10. Being aggrieved and dissatisfied with the said judgment and order dated 29.01.2002 passed by the learned Additional City Sessions Judge, Ahmedabad in Sessions Case No. 26 of 2001, the present appeal is filed by the accused through Jail before this Court under Section 374 of the Code of Criminal Procedure.

11. Mr. B.N. Keshwani, learned advocate appearing for the appellants – original accused No. 1 has taken us through the oral as well as documentary evidence which are on record and also assailed the judgment and order of the learned Additional City Sessions Judge, Ahmedabad dated 29.01.2002. He has further submitted that the learned Additional City Sessions Judge has erred in convicting the appellants though there was no cogent or

adequate evidence showing his guilt in the matter. He has further submitted that the learned Additional City Sessions Judge, Ahmedabad has failed to appreciate that the appellants are innocent and have not committed the alleged offence. The Panch witnesses have not supported the case of the prosecution at all. Other independent witnesses have also not supported the case of the prosecution. Except the evidence of police witnesses, there is no iota of evidence on the record of the case. The conviction in such a serious offence and the awarding of sentence of 10 years rigorous imprisonment and fine of Rs. 1 Lac on the basis of evidence of the witnesses of police personnel only is not proper, legal and valid and, therefore, the impugned judgment and order is required to be quashed and set aside.

12. Mr. Keshwani has further submitted that the evidence pressed into reliance by the prosecution is untrustworthy, unreliable and can never form the basis of conviction. Though there is no dispute with regard to the fact that mere non support by independent witnesses can by itself never result in acquittal, it is equally well

settled that when reliance is to be placed solely on the testimony of police officers, who can be termed to be interested witnesses, their evidence is required to be minutely and carefully scrutinized and any doubts or serious contradictions emerging from their testimonies would destroy the very strength of the prosecution version. He has further submitted that whenever there is no independent corroboration, the testimony of the police witness is required to be weighed very carefully. In the present case, the police witnesses have not only contradicted each other, but serious flaws appear on the record of the proceedings on account of the testimonies of the police witnesses and no reliance can be placed on the testimonies of such witnesses.

13. Mr. Keshwani has further submitted that though the appellant – accused No. 1 is attributed to have been found in actual physical possession of Opium, there is nothing on record which would establish so beyond reasonable doubt. He has invited the Court's attention to Exh. 16 – which is an entry in the register reducing into writing the secret information and pointed out that

nowhere therein it is mentioned that the accused No. 1 would be in possession of the narcotic substance. Even the arrest memo Exh. 21 does not establish or indicate in any manner that it is the accused No. 1 himself, who was in actual physical possession of the narcotic substance. He has, therefore, submitted that the doubts arise with regard to the fact as to whether the accused No. 1 was really found to be in physical and conscious possession of any narcotic substance at all. The entire process right from selection of Panchas and at all subsequent stages a doubt has been created about the genuineness of the prosecution version. He has further submitted that it appears from the panchnama Exh. 20 that both the panchas were local residents of Naroda. The selection of such persons as Panchas created a grave doubt with regard to the genuineness of the prosecution version especially in light of the fact that locality in which the raid took place was essentially a locality where there were large number of residential premises, shops and offices.

14. Mr. Keshwani has further submitted that the raid in question was in relation to very serious offence and

hence, the Panchas should have been selected in a manner whereby due care and caution was exercised and efforts were made to select reasonably well educated and literate Panchas. The Panch witness – P.W. 1 was a person, who was not even fully capable of affixing his own signature and hence, the only inference that can be drawn is that the panchas of such a nature and qualification were deliberately selected to cook up evidence.

15. Mr. Keshwani has further submitted that the star witness of the prosecution is P.W. 1 – P.I. Parmar, the complainant. He has submitted that this witness has deliberately made a number of false statements on oath and his testimony is required to be discarded. The entire set of documentary evidence pressed into reliance is creating an impression that the same have been subsequently cooked-up with a view to falsely support the prosecution version. Since both the panch witnesses have clearly denied any such documents being executed and drawn in their presence, grave doubts arose with regard to the genuineness and authenticity of such documents. Even the police witnesses have tripped over

themselves in the course of their testimonies. Mr. Keshwani has further submitted that P.W. 2 being the complainant has admitted that erasures were made with white ink in the entry Exh. 16. He has further submitted that in the course of his testimony, a number of serious contradictions have arisen which go to the root of the genuineness of the prosecution version. On page 11 of his testimony, Mr. Keshwani has pointed out that the said witness has testified on oath that the accused No. 2 had attempted to flee from the scene of the raid after getting down from a Scooter. As a matter of fact, it was not a case of prosecution that at the time when the raid was taking place, there was any Scooter. An electric pole, figuring and featuring prominently in the Panchnama and other documents including the complaint assumes great importance especially in light of the fact that there is a serious discrepancy with regard to the number given to the said pole by the electric company. The complaint Exh. 22 clearly mentions that both the accused were stopped near an electric pole bearing No. 516, whereas in cross-examination, the number given to the said electric pole was 716 and not 516. He has further submitted that

Exh. 20 & 25 wherein the location of the site of the raid is clearly mentioned to be near an electric pole bearing No. 516 and not 716. This discrepancy in mentioning the number of pole is not at all explained by prosecution.

16. Mr. Keshwani has further submitted that both the Police Inspectors, who claimed to be present right since the time when the secret information was received till the time the accused were arrested, have also contradicted the documentary evidence with regard to the number of seals affixed on the muddamal contraband narcotic substance. In absence of independent corroboration in the form of support of the Panch witnesses, this contradiction itself creates grave doubts with regard to the identity of the muddamal. P.W. 2 in the course of his testimony, clearly indicated that only one seal was applied on each of the Muddamal being mark A, A-1 & A-2. Even P.W. 3 Mr. Chauhan, in the course of his testimony Exh. 33 has deposed in a similar fashion stating that only one seal was affixed on each of the muddamal samples. However, F.S.L. Report Exh. 37 gives a description of the muddamal sample mark A-1 and it has been clearly stated that the packet earmarked

as mark A-1 was having two seals on it. He has, therefore, submitted that grave doubts have been created with regard to the identity of the muddamal in question which was sent to F.S.L. for analysis and test thereupon.

17. Mr. Keshwani has further submitted that the provisions contained in Section 50 of the Act have not been complied with. The document Exh. 18 is obviously a forged document as there is an interpolation about the number of electric pole. More over, no time has been written in the document Exh. 18 as to when it was prepared. The Panchas have not supported document Exh. 18 and hence the very existence and genuineness of the document is doubtful. Even the provisions contained in Section 52 of the act have not been complied with since the accused have not been handed over to an Officer in-charge of the nearest Police Station as provided in Section 52 (2) of the Act. There is no compliance of the provisions contained in Section 102 (3) of Cr.P.C.

18. Mr. Keshwani has further submitted that the sealing

procedure was not properly followed and there were serious lapses. In support of this contention, he relied on the decision of this Court in the case of **Navinkumar @ Shambhuprasad @ Bapji Chimanlal Vyas V/s. State of Gujarat, 2006 (1) G.L.H. 409** wherein after considering earlier three decisions of this Court, namely, (1) Chandrakant Nagindas Modi V/s. State of Gujarat, 1989 (I) FAC 153, (2) unreported decision dated 17.08.2001 rendered in Criminal Appeal No. 323 of 1996 filed by Jitendra @ Sanjaykumar Suryakant Desai against State of Gujarat and (3) decision dated 07.05.2002 rendered in Criminal Appeal No. 287 of 1999 filed by Ganpatram Punmaram Vishnoi against State of Gujarat, the Court held that as per the law laid down by this Court, the slips bearing signatures of the panch-witnesses should be affixed on samples and thereafter seals should be applied so that if any attempt is made to tamper with sample, the slips affixed would get torn. On re-appreciation of evidence, the Court was satisfied in that case that correct and fool-proof procedure of sealing was not resorted to by the Investigating Officer and possibility of tampering with muddamals was not ruled out at all. The Court has evaluated such deficiency in

light of other discrepancies brought on record of the case and held that it was difficult to sustain conviction of the appellant – accused. The appeal was accordingly allowed and the appellant – accused was ordered to be released from jail forthwith unless his presence in jail was needed with reference to any other case.

19. In view of the above factual background and for non-compliance of the statutory provisions and keeping in mind the judicial pronouncements on the issues raised, Mr. Keshwani has strongly urged that no other finding except acquittal of the accused from the charges levelled against them would meet with the ends of justice.

20. Mr. Ashish M. Dagli, learned advocate appearing for the appellant No. 2 – original accused No. 2 has adopted all the arguments canvassed by Mr. Keshwani. Over and above this, he has further submitted that the accused No. 2 was falsely implicated and nothing objectionable was found from his possession. Simply because the accused No. 2 was accompanying the accused No. 1 and simply because, he made an attempt to ran away after seeing the raiding party, he could not have been

implicated and/or held to be guilty of the alleged offence. In support of this submission, he relied on the decision of the Hon'ble Supreme Court in the case of **Sorabkhan Gandhkhan Pathan and another V/s. State of Gujarat, reported in (2004) 13 Supreme Court Cases 608**, wherein it is held that no material was produced to establish that the accused No.2 in that case had knowledge that accused No.1 was carrying contraband articles or was conniving with the said accused in carrying the contraband articles and hence conviction of accused No.2, in absence of any such material, only on the basis of his being in the auto rickshaw was not sustainable. He has, therefore, urged that the accused No.2 deserves to be acquitted on this ground.

21. Mr. K. P. Raval, learned Additional Public Prosecutor, on the other hand has supported the order and judgment of the learned Additional City Sessions Judge, Ahmedabad and submitted that there was no violation of any statutory provision and all necessary compliances were made by the raiding parties and/or investigating agency and there was no substance in the argument that the

provisions contained in Section 50 as well as 52 (3) of the Act were violated. So far as sealing procedure is concerned, Mr. Raval has relied on the decision of the Hon'ble Supreme Court in the case of **Babubhai Odhavji Patel and Others V/s. State of Gujarat, 2005 (8) SCC 725** and submitted that the learned Additional City Sessions Judge has discussed this issue at length in the impugned judgment and order and he has come to the right conclusion that there was no violation of the sealing procedure. He has, therefore, submitted that the sealing procedure was properly followed by the raiding party and/or Investigating Agency and the conviction of the appellants – accused cannot be disturbed on this ground.

22. Mr. Raval has relied on the decision of the Hon'ble Supreme Court in the case of **State of Punjab V/s. Balbir Singh, (1994) 3 S.C.C. 299** wherein it is held that the provisions of Section 52 & 57 are by themselves not mandatory. These provisions contain certain procedural instructions for strict compliance by the Officers. But if there is no strict compliance of any of these instructions that by itself cannot render the acts

done by these Officers null and void and at the most it may affect the probative value of the evidence regarding arrest or search and in some cases it may invalidate such arrest or search. But such violation by itself does not invalidate the trial or the conviction if otherwise there is sufficient material. Therefore, it has to be shown that such non-compliance has caused prejudice and resulted in failure of justice.

23. Mr. Raval has further submitted that the prosecution has clearly established beyond reasonable doubt the charges against the accused as the accused No. 1 was found in conscious possession of a huge quantity of a narcotic substance Opium weighing about 10 Kgs. and the accused No. 2 has aided and abetted the accused No. 1 in regard thereto. He has, therefore, submitted that in view of the provisions contained in Section 17 read with Section 29 of the Act, both the accused are required to be penalised. Mr. Raval has further submitted that it is true that the prosecution case is merely based on the testimonies of the members of the raiding party consisting of the Police Officers and there is no independent corroboration to support the prosecution

version. However, absence of independent corroboration and independent support would not render the prosecution version to be unacceptable in light of the settled legal position. Merely because the Panchas have not supported the prosecution version or have testified in a manner as would even contradict the prosecution version, then also, since the prosecution has established by other believable, trustworthy and corroborative evidence the charges against the accused, mere non-support by the Panchas would not be fatal to the case of the prosecution. The important witnesses being P.W. 2 – Mr. J.N. Parmar and P.W. 3 – Mr. Chauhan who were the members of the raiding party and were also present right since the inception of the proceedings have supported and corroborated the prosecution version. The documentary evidence on the record of the proceedings clearly establish the involvement, presence and role of each of the accused in the offences charged with. Mr. Raval has further submitted that even if there is any discrepancy or contradiction emanating from the testimonies of P.W. Nos. 2 & 3, the same would not affect the case of the prosecution. From the documentary evidence on record, more particularly, the

documents Exh. 17, 18, 19, 21, 26 & 29, it is clear that all the mandatory provisions contained in the Act have been fully complied with by the members of the raiding party and, therefore, the prosecution having clearly established beyond reasonable doubt the guilt of both the accused, the conviction order passed by the learned Additional City Sessions Judge, Ahmedabad is required to be upheld.

24. We have considered the submissions advanced by Mr. B. N. Keshwani & Mr. A.M. Dagli, learned advocates appearing for the appellants - original accused Nos. 1 & 2 respectively and Mr. K.P. Raval, learned Additional Public Prosecutor, appearing for the State of Gujarat at length. We have also undertaken a complete and comprehensive exercise of appreciating all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case. We have also gone through the entire testimonial collections. We have applied our mind to the impugned judgment and order passed by the learned Additional City Sessions Judge, Ahmedabad convicting the accused and sentencing them for R.I of 10 years and fine of Rs.1

lac each and in default thereof, to undergo further R.I of two years each.

25. In order to find out whether the prosecution has established the charge against the accused beyond reasonable doubt and whether the learned Additional City Sessions Judge has recorded a just and correct conclusion holding the accused Nos. 1 & 2 guilty, we may first advert to the oral testimony of the prosecution witnesses.

26. The case of the prosecution is more or less based on the evidence of police personnels. There are five prosecution witnesses. P.W. 2 – Mr. J.N. Parmar – Exh. 25 is the complainant and one of the members of the raiding party. P.W. 3 – Mr. V.L. Chauhan – Exh. 33 is also a police personnel and member of the raiding party. P.W. 4 – Mr. J.B. Rana – Exh. 35 is an Investigating Officer and P.W. 5 – Mr. M.K. Gadhvi – Exh. 38 is a police personnel who carried out muddamal to F.S.L. P.W. 1 – Mr. Mathurbhai M. Mistry, Exh. 13 is a panch witness who has not supported the case of the prosecution.

27. From the detailed examination and analysis of the prosecution witnesses and the documentary evidence produced on record by the prosecution, it appears to us that various discrepancies, contradictions, omissions and infirmities are found in the oral as well as documentary evidence. Though several contentions were raised before the Trial Court and before this Court and we found substance therein, we, however, confine ourselves to deal with the strong protest lodged against sealing procedure adopted by the prosecution. Even otherwise, we do not think it just and proper to deal with those other contentions and rest our decision thereon as the appellants challenge against sealing procedure adopted by the prosecution coupled with those other contentions, is strong enough to disturb the finding recorded by the Trial Court and renders the accused to be acquitted. The main grievance was that the identity of the muddamal and the samples sent to the F.S.L. is not established. There was a possibility of tampering with the contents of the samples. The samples were not kept in safe and proper custody and the sealing procedure was absolutely defective. There is difference in the affixing of the seals

used for sealing samples and so misuse of the seal for tampering the contents of the sample cannot be ruled out.

28. To examine and appreciate this contention, relevant provisions in the Act or Rules made thereunder touching this subject matter are required to be looked into. Section 55 of the Act deals with Police to take charge of articles seized and delivered. It provides that Officer in charge of police station shall allow any officer depositing the seized articles to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station. Except this, no provision seems to have been made in the present Act and Rules framed thereunder regarding mode of taking and sealing of the sample, mode of assigning the same to chemical examiner and their chemical examination or even touching the above matters. However, the Central Government issued Standing Instruction / Orders. Standing Order No. 1/88 dated 15.03.1988, Standing Order No. 2/88 dated 11.04.1988 and Standing Order No. 1/89 dated 13.06.1989 are required to be looked

into. Standing Instruction 1/88 speaks about procedure regarding drawl, storage, testing and disposal of samples from seized narcotic drugs and psychotropic substances. Standing Order No. 2/88 deals with receipt, custody, storage and disposal of seized/confiscated narcotic drugs and psychotropic substances. Standing Order No. 1/89 relates to general procedure for sampling, storage etc. Standing Instruction / Order No. 1/88 inter alia provides as under :-

(i) If the drugs seized are found in packages/containers, the same should be serially numbered for purpose of identification etc.

(ii) Samples must be drawn on the spot of recovery in duplicate, in the presence of search (panch) witnesses and the person from whose possession the drug is recovered.

(iii) The quantity to be drawn in each sample should be 5 gms in respect of all narcotic drugs and psychotropic substances except in the cases of opium, ganja and charas, hashish where a quantity of 24 gms in each case is required. The same quantity should be taken for the duplicate samples also. The seized drugs in the packages/containers should be well mixed to make it homogeneous and representative before the sample in duplicate is drawn.

(iv) In the case of seizure of a single package/container one sample in duplicate is to be drawn. In case of seizure of more than one packages/container one sample in duplicate from each package/container should be drawn.

(v) All samples must be drawn and sealed in the presence of the accused, panchnama witnesses and seizing officer and all of them shall be required to put their signatures on each sample. The official seal of the seizing officer should also be affixed. If the person from whose possession the drugs have been recovered, wants to put his own seal on the sample, the same may be allowed on both the original and duplicate of each sample.

(vi) The sample in duplicate should be kept in heat sealed plastic bags. The plastic bags should be kept in a paper envelope and properly sealed. Such sealed envelope should be marked as original and duplicate.

(vii) The samples should be dispatched to the respective laboratories under the cover of a Test Memo which shall be prepared in triplicate in proforma NCB-1.

29. Despite the aforesaid Standing Orders / Instructions, the proper procedures are not being followed by the Investigating Agency and cases have come up before the Court. In the case of **Chandrakant Nagindas Modi V/s. State of Gujarat, 1989 (I) FAC 153**, this Court has taken the view that the muddamal was not properly sealed and there was all possibility of substituting the substance. Coupled with this, the fact that the muddamal remained with the police for more than two months raises a doubt. The prosecution has, therefore, failed to establish the offence beyond reasonable doubt against the appellant. The Court further held that this aspect has

escaped the notice of the Learned Trial Judge and in view thereof, the Court allowed the appeal and acquitted the appellants.

30. In **Criminal Appeal No. 323 of 1996,** in the case of **Jitendra @ Sanjaykumar Suryakant Desai V/s. State of Gujarat** decided on 17.08.2001, the Court has taken the view that the contention regarding laxity in following the procedure relating to sealing of the seized contraband articles has some substance. After considering the evidence of the Investigating Officer and Panch witnesses, the Court has observed that after drawing the samples, at the time of sealing the samples as well as the remainder of the contraband seized, the slips containing signatures of the Panch witnesses and the Police Officer were placed inside the bags, thereafter the bags were stitched and wax seals were applied. There is no dispute that the Seal remains in custody of the police. The possibility of tampering with the muddamal at a later stage and then again resealing the same by the Investigating Agency cannot be ruled out. The very purpose behind carrying out the search, taking of sample and sealing in presence of Panch witnesses is

to ensure that there is no scope for any mischief in procedure required to be followed. At the time of sealing, slips containing signatures of Panch witnesses as well as the Investigating Officer are affixed on the articles seized and a seal is applied over it, so that, in case of any attempt for tampering with the article seized, the seal would be broken or the slip would be torn which would immediately reveal such an attempt. If the slip is put inside as was done in that case, the possibility of tampering cannot be ruled out. Under the circumstances, the Court held that the procedure followed for sealing in that case cannot be said to be proper and free from any possibility of tempering. The procedure,therefore, cannot be said to be beyond the scope of any reasonable doubt and in that event, benefit must go to the accused.

31.This Court has again considered this issue in **Criminal Appeal No. 287 of 1999 in the case of Ganpatram Punmaram Vishnoi V/s. State of Gujarat** decided on 07.05.2002 Additional Public Prosecutor, as an officer of the Court, has pointed out in the case that no proper sealing has been done by the PSO and, therefore,

possibility of tampering with the muddamal cannot be ruled out. The Court took the view in that case that the slip signed by the panchas as well as the PSO, which was kept along with the polyethylene bag is required to be affixed at the outer portion below the wax seal of the police station. If the police keeps the slip signed by the panchas and the PSO along with the sample muddamal and affix the seal of the police station at the outer portion of the bag, possibility of tampering the muddamal cannot be ruled out as the official seal always remains with the concerned police station. The Court, therefore, held that it is obligatory on the part of the police to see to it that the slip signed by the panchas as well as the concerned Officer is affixed at the outer portion of the sample bag below the official seal of the police station. This procedure will totally rule out the possibility of any tampering with the sample muddamal. This has not been done in that case and hence, the Court held that the procedure adopted by the PSO cannot be said to be free from any doubt and the possibility of the tampering also cannot be ruled out. The Court held that in any case, the benefit must go to the accused.

32.All the aforesaid three judgments have been referred to and relied upon by this Court in its later decision in the case of **Navinkumar @ Shambhuprasad @ Bapji Chimanlal Vyas V/s. State of Gujarat, 2006 (1) G.L.H. 409** and also in the case of **Kamlaprasad Ramjiprasad Gupta And another V/s. State of Gujarat in Criminal Appeal No. 1366 of 1999 with Criminal Appeal No. 34 of 2000 decided on 21.09.2006** held that the slips bearing signatures of the panch-witnesses should be affixed on samples and thereafter seals should be applied so that if any attempt is made to tamper with sample, the slips affixed would get torn.

33.If we consider the procedure laid down in the aforesaid Standing Instruction / Order as well as the ratio of above referred five different judgments of this Court, in light of the facts found from the deposition of the Panch witnesses, Police witnesses and F.S.L. Report as well as from the documents produced on record, we have no hesitation in coming to the conclusion that in the present

case also, proper procedure has not been followed by the prosecution. P.W. 2 – Mr. J. N. Parmar – Exh. 15 has deposed that from the muddamal contraband articles, 50 grams each were drawn by way of samples and were put into two plastic bags, one for F.S.L. and another one for reserve sample and both the bags were heat sealed. Those two plastic bags were kept into plastic boxes and two slips duly signed by panch witnesses as well as accused were placed into those plastic boxes and they were closed with lids. Thereafter, both the boxes were wrapped with white paper and they were separately tied out by string and thereupon slips duly signed by the panch witnesses as well as accused were affixed. Again the same was tied down by string, wax seal was applied and both the boxes were sealed. The sample which was to be sent to F.S.L. was marked A/1 and the sample which was to be kept as reserve was marked A/2 and the remaining quantity of muddamal articles were kept as they were in the bag.

34. P.W. 3 – V.L. Chauhan – Exh. 33 in his deposition has stated that from the muddamal contraband articles, 50 grams each were taken separately and the same were

kept in plastic bag and both the plastic bags were heat sealed and thereafter kept in small boxes. Both the boxes were kept separately and the same were wrapped with white paper and thereafter the slips duly signed by P.W. 2 – Mr. Parmar and panch witnesses were placed and thereafter it was tied with string. Thereafter, it was sealed with the mark of P.I. NDPS CIG Crime and one box which was to be sent to F.S.L. was marked as A-1 and another one which was to be kept as reserve was marked as A-2.

35. We have considered the judgment of the Hon'ble Supreme Court in the case of **Babubhai Odhavji Patel and Others V/s. State of Gujarat, (Supra)** on which reliance was placed by Mr. Raval. However, in that case, the Hon'ble Supreme Court has observed that the appellants' contention in that case that the seal on the sample sent to the Forensic Science Laboratory was found tampered with and this creates a serious suspicion about the report furnished by the Laboratory, was elaborately dealt with by the Sessions Court and the appellant had given up this plea before the High Court. In the present case, the learned counsels appearing for

the appellants – accused have effectively and strenuously pressed into service their submissions with regard to the sealing procedure adopted by the raiding party and/or Investigating Agency and since the same was found to be faulty and defective, the possibility of tampering cannot be ruled out. We are, therefore, of the view that the above decision of the Hon'ble Supreme Court would not render any assistance to the case of the prosecution.

36. The panch witness, namely, Mayurbhai M. Mistry – P.W. 1 – Exh. 13 in his deposition has, however, denied the fact regarding recovery of muddamal as well as sealing procedure. The other panch witness has not been examined at all by the prosecution. Even if we ignore the evidence of the panch witnesses, the sealing procedure narrated in the evidence of P.W. 2 and P.W. 3 is found to be defective and possibility of tempering with muddamal cannot be ruled out.

37. As observed earlier, there is also contradiction with regard to the affixing of seal as the police witnesses have stated that there is only one seal affixed on the sample marked A/1 whereas F.S.L. Report says that there were

two seals on the said sample. From the evidence of these police witnesses and F.S.L. Report, it is clearly found that the slips were loosely kept in the cloth bag and it was not affixed on each of the plastic bag. The report further makes it clear that the proper procedure has not been followed by the raiding party and/or Investigating Agency. Because of the material contradictions between the depositions of the prosecution witnesses regarding the affixing of the seal and the sealing procedure coupled with the serious doubt raised about custody of Muddamal articles, this Court is of the view that there may be a possibility of tampering with the contents of the sample before they were sent to F.S.L. for analysis. When there is possibility of tampering with the contents of the sample, then no reliance can be placed on the expert opinion and the report of the F.S.L. and it cannot be said that the contraband articles were seized from the possession of the accused and that the sample therefrom was taken and that the sample was sent for analysis and that the report of the expert is regarding the same. When it is so, then the report deserves to be discarded in toto. Standing Instructions issued by the Central Government

are violated as contradiction is found in the evidence of P.W. 2 & P.W. 3 with regard to the fact of accused signing the slips which were found in the cloth bags containing the samples. In light of these discrepancies, it is very unsafe to sustain the conviction order. Both the accused are arrested in November, 2000. Almost 6 years are about to be over. It is very unfortunate that the appeal could not be heard earlier. Because of the fact that this Court has consistently taken the view that when the sealing procedure is not adopted in accordance with the provisions of the Act as well as the guidelines issued by the Central Government and if other contradictions, inconsistencies and infirmities are found, in that case, , the conviction cannot be upheld.

38. So far as the appellant No. 2 – accused No. 2 is concerned, there is one more reason to acquit him from the charges levelled against him.

39. In the case of **State of Punjab V/s. Balkar Singh and another, (2004) 3 S.C.C. 582,** the accused were alleged to have been found present at the place where

about 100 bags of poppy were recovered. They were sitting on such bags and they have failed to give any satisfactory explanation for being present at that place. The Hon'ble Supreme Court in that case has considered the question as to whether mere presence of the accused is enough to take the view that the accused was in conscious possession of prohibited substance. The Hon'ble Supreme Court held that mere being found to be present at the place where the poppy husk bags were found and the failure to give any satisfactory explanation for being so present did not prove that the accused persons were in possession of the said poppy husk bags. Similarly, in the present case, simply because the accused No. 2 was accompanying the accused No. 1 and simply because he made an attempt to run away after seeing the raiding party, it can not be proved beyond reasonable doubt that the accused No. 2 was aware about the fact that the accused No. 1 was carrying muddamal contraband articles with him and he has abetted the accused No. 1 in commission of the alleged offence.

40.In the case of **Sorabkhan Gandhkhan Pathan and**

another vs. State of Gujarat, reported in (2004) 13 Supreme Court Cases 608, the Hon'ble Supreme Court has acquitted the accused No. 2 who was travelling in an auto-rickshaw by holding that no material was produced to establish that the accused No.2 in that case had knowledge that accused No.1 was carrying contraband articles or was conniving with the said accused in carrying the contraband articles and hence conviction of accused No.2, in absence of any such material, only on the basis of his being in the auto-rickshaw was not sustainable. On the same parity of reason, the conviction of the accused No. 2 in the present case cannot be sustained simply because he was in the company of the accused No. 1 without there being any material on record to show that he was aware about the fact that the accused No. 1 was carrying the contraband articles with him or that he was conniving with the said accused in carrying the contraband articles.

41. In peculiar facts of the present case and in light of the decisions referred to herein above and the principles laid down therein, we are of the opinion that the conviction order passed against the accused Nos. 1 & 2 cannot be

sustained. The Appeal, therefore, succeeds. The order of the learned Additional City Sessions Judge, Court No. 9, Ahmedabad dated 29.01.2002 passed in Sessions Case No. 26 of 2001 convicting the accused Nos. 1 & 2 for offences punishable under Section 17 read with Section 29 of the Act and sentencing them to rigorous imprisonment of 10 years and fine of Rs. 1 Lacs each and in default thereof, rigorous imprisonment for two years each for commission of such offence is hereby quashed and set aside. The appellant Nos. 1 & 2 – Sohanlal Kasiram Brahmin & Ramchandra Shankarlal Brahmin – original accused Nos. 1 & 2 respectively are hereby acquitted from the charges levelled against them. The respondent – State of Gujarat and the jail authority is hereby directed to release the appellants – original accused Nos. 1 & 2 from jail forthwith unless their presence is required in connection with any other case. Amount of fine, if paid shall be refunded to them.

[A. M. KAPADIA, J.]

[K.A. PUJ, J.]

Savariya